IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 435 of 1989

in

SPECIAL CIVIL APPLICATION No 93 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES Yes

2. To be referred to the Reporter or not? Yes GLH (UJ) :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? No :

TATA IRON & STEEL CO.LTD.

Versus

MUNICIPAL CORPORATION OF CITY AHDMEDABAD.

Appearance:

MR SV RAJU for Appellant

MR BP TANNA for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 29/03/2000

ORAL JUDGEMENT

(Per : Panchal,J.)

By means of filing this appeal under Clause 15 of the Letters Patent, the appellant has challenged legality of judgment dated February 24, 1986 rendered by the learned Single Judge in Special Civil Application No. 93/86, by which prayer made by the appellant to direct the respondent to refund the excess octroi duty recovered from the appellant on account of illegal levy of duty on Mild Steel Galvanised Pipes and Mild Steel Black Pipes under the head of "Sanitary Fittings", is rejected.

2. The Indian Tube Company Limited was amalgamated with the appellant i.e. The Tata Iron & Steel Company Ltd. pursuant to the orders passed by the Bombay High Court in Company Petition No.89 of 1984, which was filed under sections 391 & 394 of the Companies Act, 1956 as well as the order of Calcutta High Court in Company Petition No.107/84. Because of the orders passed by the Bombay High Court and Calcutta High Court, the properties, rights, powers etc of the Indian Tube Company Limited were transferred to the appellant-Company with effect from April 1, 1983. The appellant-Company deals in Mild Steel Galvanised Pipes ('MSGP' for short) and Mild Steel Black Pipes ('MSBP' for short) amongst other goods. The appellant is having a Branch Office at Ahmedabad which imports from its Calcutta office MSGP and MSBP which are liable to octroi duty levied by the respondent-Corporation. Previously, MSGP and MSBP were subjected to octroi duty under the head "Sanitary Fittings". Pravinchandra & Co. a registered partnership at Ahmedabad and others had filed Special Civil Application No.1583/80 in the Gujarat High Court challenging, inter-alia, Circular dated May 5, 1980 issued by the respondent-Corporation whereby direction was issued to the concerned officers to treat MSGP and MSBP as liable to octroi duty under the entry 'Sanitary Fittings'. The learned Sigle Judge of this Court by judgment dated July 21/22, 1982 held that MSGP and MSBP of more than 1 1/2" diameter are not liable to octroi duty under the entry 'Sanitary Fittings' as shown in Item No.28-A of the Schedule, but the Corporation would be entitled to levy octroi duty on the said MSGP and MSBP of more than 1 1/2" diameter under Item No. 41-N of the Schedule at the rate of 2% ad-valorem. By the said judgment, the Municipal Commissioner was directed to decide the question as to whether MSGP and MSBP having diameter of 1/2", 3/4", 1" and 1 1/2" are 'sanitary

fittings' so as to fall under Item No.28-A of the Schedule. The petitioner has produced a copy of the judgment of the High Court rendered in Special Civil Application No.1583/80 at Annexure-A to the petition. Pursuant to the direction given by the High Court in the aforesaid petition, Municipal Commissioner by his order dated June 27, 1983 held that MSGP and MSBP having diameter of 1/2", 3/4", 1" and 1 1/2" are not 'sanitary fittings'. It was further held that these pipes are liable to octroi duty under Item No. 41-N of the Schedule. A direction was also given that the excess octroi duty collected from the petitioners of Special Civil Application No. 1583/80 should be refunded within six months from the date of the order. A copy of the said order is produced by the appellant at Annexure-B to the petition. The case pleaded by the appellant is that the decision of the Municipal Commissioner of the respondentCorporation was communicated to the appellant by a letter dated September 14, 1983 by the Deputy Municipal Commissioner and, therefore, the appellantCompany is also entitled to refund of excess octroi duty paid. The appellant had submitted a statement of claim for refund of octroi duty in view of the fact that MSGP and MSBP are liable to octroi duty at the rate of 2% ad-valorem and not 3.5% ad-valorem. A summary of the comparative written statement was also submitted by the appellant before the competent authority. As request made by the appellant to refund the excess octroi duty paid was not responded favourably, the appellant sent a letter dated September 6, 1984 through an advocate to the Assistant Municipal Commissioner, Octroi Department of the Corporation asking him to look into the matter and implement the judgment of the High Court rendered in Special Civil Application No. 1583/80. Similar request was made by the appellant to the Municipal Commissioner of the Corporation, who afforded personal hearing to the appellant's advocate, but ultimately, the appellant was informed by a letter dated December 26, 1984 addressed by the Assistant Municipal Commissioner that the appellant was not oneof the petitioners in Special Civil Application No. 1583/80 and was, therefore, not entitled to refund of excess octroi duty paid. This communication is produced by the petitioner at Annexure-K to the petition. After receipt of letter dated December 26, 1984 refusing to refund excess octroi duty collected, the appellant took-up the matter with the Municipal Commissioner and the Assistant Municipal Commissioner (Octroi) by his communication dated June 12, 1985 informed the appellant that on legal advice, it was concluded by the Municipal Commissioner that refund of octroi could not be granted and,

therefore, it was not possible to accept the prayer made by the appellant to refund the excess octroi duty paid. The case of the appellant is that there existed no rational basis for the respondent-Corporation to discriminate the appellant-Company merely on the ground that the appellant-Company was not one of the petitioners in Special Civil Application No. 1583/80 and, therefore, the respondent is liable to refund excess octroi paid. What is claimed by the appellant is that it was immaterial whether a person was a petitioner in Special Civil Application No. 1583/80 or not because once it is held that MSGP and MSBP are not 'sanitary fittings' and that octroi duty has been erroneously levied under the rates applicable for sanitary fittings, those who had paid excess octroi duty were entitled to refund of the same. It is pleaded by the appellant that the respondent-Corporation having collected octroi duty on MSGP and MSBP under the head 'sanitary fittings' without jurisdiction, is bound to refund the octroi duty collected in excess. Under the circumstances, Special Civil Application No. 93/86 was filed with a prayer to direct the respondent-Corporation to refund the excess octroi duty recovered from the appellant-Company on account of illegal levy of duty on MSGP and MSBP under the head 'sanitary fittings'.

3. Though the respondent-Corporation was duly served, no reply affidavit was filed controverting the averments made in the petition.

4. It was noticed by the learned Single Judge that the appellant had not filed application for refund of octroi duty within 30 days as provided under Rule-12 of the Ahmedabad Municipal Corporation Octroi Rules and as no general directions were given by the Court in Special Civil Application No. 1583/80 to the Municipal Corporation to refund the excess octroi duty to all the persons similarly situated the appellant was not entitled to refund of excess octroi duty paid. The learned Single Judge was of the opinion that if the appellant was aggrieved by the action of the Corporation, he could have resorted to an alternative efficacious remedy of filing Civil Suit for getting excess octroi duty paid by it. In view of these conclusions, the learned Single Judge rejected the petition by judgment dated February 24, 1986, which has given rise to present appeal.

5. Mr. S.V.Raju, learned Counsel for the appellant submitted that there were no disputed questions of facts involved in the petition and as the point involved in the petition is squarely covered by the earlier judgment of

the High Court rendered in Special Civil Application No. 1583/80, the petition should not have been dismissed on the ground that the appellant had failed to resort to alternative remedy available. What was claimed was that the action on the part of the respodent in not refunding the excess amount of octroi duty recovered from the appellant-Company, is arbitrary as well as illegal and, therefore, the judgment impugned in the appeal should be set aside. It was also emphasised by the learned Counsel for the appellant that the classification sought to be made by the respondent that those who were not parties to Special Civil Application No.1583/80, were not entitled to refund of excess amount of octroi recovered, is not only arbitrary, but violative of provisions of Artile 14 of the Constitution and, therefore, the appeal should be allowed.

6. Mr. B.P.Tanna, learned Counsel for the Corporation submitted that a petition solely praying for issuance of a writ of mandamus directing the Corporation to refund the amount of octroi alleged to have been illegally collected is not maintainable and, therefore, the judgment impugned in the appeal should be upheld. It was asserted on behalf of the Corporation that claim for refund of the appellant is based on the decision rendered in another case holding the levy to be not exigible in law or illegal and, therefore, in view of clause (1) of format order which is provided by the Supreme Court in Assistant Collector of Customs and others v. Anam Electrical Manufacturing Co. and others, (1997)5 SCC 744 which in turn is based on the decision of the Supreme Court in Mafatlal Industries Ltd.and others v. Union of India and others, (1997)5 SCC 536, even Civil Court will not be entitled to pass order for refund of octroi already recovered and, therefore, the appeal should be dismissed. What was emphasised was that the appellant has not established that the burden of octroi recovered by the Corporation was not passed on by the appellant to the customers and, therefore, in view of the doctrine of unjust enrichment, the appeal should be dismissed. It was also contended that the application for refund having not been filed within 30 days as required by Ahmedabad Municipal Corporation Octroi Rules, the appellant was not entitled to refund of octroi, which was collected in excess and, therefore also the appeal should be rejected.

7. We have taken into consideration the submissions advanced at the Bar as well as the documents forming part of the petition. In view of the conclusion of the learned Single Judge that the appellant has an alternative efficacious remedy of filing a suit available

for getting refund of excess amount paid by it, the only question which arises for our consideration in the present appeal is whether a petition solely praying for issuance of a writ of mandamus directing the Corporation to refund octroi alleged to have been illegally collected is maintainable. In our view, this question is no more res-integra and is squarely decided by the constitution bench decision of the Supreme Court against the appellant in SUGANMAL v. STATE OF MADHYA PRADESH AND OTHERS, AIR 1965 SC 1740. The facts of the said case were that the appellant had its foundry at Indore where it was carrying on business of mechanical engineers iron, brass and malleable iron founders and re-rollers in steel. The Indore Industrial Tax Act, 1927 was in force in the Indore State, which enabled the authority to impose industrial tax on cotton mills. The excess profits duty was payable under the Indore Excess Profits Duty Order, 1944. The appellant-Company was not running any cotton mill, still, the Company was called upon to submit its returns and to deposit industrial tax. In all, the Company had paid a sum of Rs. 18,234-5-2 in 1944 in advance on account of industrial tax prior to the tax being provisionally assessed by the assessing officer. The tax was assessed at Rs. 62,809-5-2. Deducting the amount which was deposited by way of advance, an amount of Rs.44,575/- was deposited by the appellant with the authority. Various appeals were filed against the assessment orders to the appellate authority. Those appeals were allowed on the ground that the appellantCompany was not liable to pay industrial tax, as it was not carrying on any business which was liable to be assessed to that tax. Thereafter the appellant had approached various officers of the State Government of Madhya Bharat for refund of tax. The Government had refused to admit the claim for refund of Rs.62,809-5-2 which had been realised from the appellant prior to the date of certain adjustments. Thereupon a writ was filed by the appellant praying for issuance of a writ of mandamus against the State of Madhy Bharat and other respondents directing them to perform statutory duties and/or to refund or cause to be refunded to the appellant the excess amount recovered. The writ petition was dismissed by the High Court. That order was challenged by the appellant before the Supreme Court. While dismissing the appeal, the Supreme Court has made following pertinent observations :-

"(6) On the first point, we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the

powers conferred under Art. 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Art. 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money aare sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take action under Art. 226 for the protection of their fundamental right and the Courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

(7) Reference may be made to the cse reported in Sri Stya Narain Singh v. District Engineer, P.W.D. Balia, (1962) Supp. 3 SCB 1055 : AIR 1962 SC 1161, where the petitioner had made several prayers in his petition under Art. 226. Some of these were not available at the time the order was passed by the High Court. He, therefore, confined his prayer for one relief only. It was for commanding the State to allow abatement of rent on account of the exemption of

the State-owned Roadway buses from liability to pay the tolls. The Single Judge issued the writ as prayed, but the Division Bench, on Letters Patent Appeal, dismissed the petition holding that he was not entitled to the abatement of rent and that he may be entitled to claim abatement of rent or licence fee under the general law but that such a relief could be claimed only in a suit but not in a proceeding under Art. 226. This Court held against the petitioner that no abatement of rent could be claimed, as there was no lawful order exempting Roadways buses from paying the toll. In view of the petitioner's prayer for the grant of any other relief, the Court felt no difficult in granting the approppriate relief and, consequently directing the issue of a writ in the nature of mandamus to the State directing it to pay to the petitioner full tolls with respect to every crossing of the Roadways buses during the relevant period. This was not a case of enforcing a contractual liability of the State Government but it was one where in the purported exercise of its governmental power, if refused to pay tolls to the contractor though it was liable to pay such tolls under the provisions of the statute viz. S.15 of the Northern Indian Ferries Act, 1878.The decision in this case cannot be used in support of the contention that a petition praying merely for a writ of mandamus for refund of tax or any money due from the State can be normally maintainable.

(8) We may also refer to Burmah Construction Co. v. State of Orissa (1962) Supp 1 SCR 242 : (AIR 1962 SC 1320) where it was prayed that an appropriate writ directing the State of Orissa to refund the amount of sales tax and penalty realised from the appellant be issued. Shah,J., speaking for the Court said :

"The High Court normally does not entertain a petition under Art. 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But, an order for payment of money may sometimes be made in a petition

under Art. 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation".

(9) We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil Court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction."

From the principle laid down by the Supreme Court it is manifest that in a petition under Article 226 of the Constitution, the High Court on setting aside the assessment orders, may exercise jurisdiction in proper circumstances to order the consequential relief for the refund of the amount illegally realised, but a petition solely praying for issuance of a writ of mandamus directing the State or an instrumentality of the State to refund money alleged to have been recovered illegally, is ordinarily not maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax and in such a suit it is open to the said authority to raise all possible defences to the claim, defences which cannot, in most of the cases, be appropriately raised and considered in exercise of writ jurisdiction.

8. We may state that the decision of the Supreme Court in SUGANMAL v. STATE OF M.P. (Supra) has been subsequently followed in Union of India and others v. Orient Enterprises and another, (1998)3 SCC 501. In the said case, the respondent had imported consignment of skimmed milk powder from Canada. A show-cause notice was issued by the Collector of Customs, Cochin on the basis that there was undervaluation of the prices in the invoices. An order of confiscation of the goods was passed by the Collector, but the respondents were permitted to redeem the goods on payment of redemption fine determined by the Collector. A penalty was also imposed. On the basis of the higher price of goods, the respondents were required to pay the difference in customs duty. An appeal was filed against the said order of the Collector before the Central Board of Excise and Customs. The appeal was dismissed by the Board,

whereupon a revision petition before the Central Government was filed, which was transferred to the Customs,Excise and Gold (Control) Appellate Tribunal. It was treated as an appeal and the appeal was allowed by the Tribunal holding that the goods had been lawfully imported and the valuation declared was correct. The appeal filed by the Revenue against the judgment of the Tribunal was dismissed by the Supreme Court. After passing of the adjudication order by the Collector, the respondent had deposited Rs. 10,34,464.23 and since the amount was not refunded, the respondents had approached the Tribunal for directions regarding the refund of the said amount and the Tribunal had directed the Collector of Customs, Cochin to refund the amount and the amount was accordingly refunded. A writ petition was filed by the respondents in Delhi High Court seeking the relief of payment of interest on the amount of Rs. 10,34,464.23 ps. for the period from the date of payment of the said amount till the date on which it was refunded to the respondents. The writ petition was allowed by the Delhi High Court. While allowing the appeal, the Supreme Court has observed as follows :-

> In the present case also till the insertion of Section 27-A in the Act by Act 22 of 1995 there was no right entitling payment of interest on delayed refund under the Act. Such a right was conferred for the first time by the said provision. Act 22 of 1995 also inserted Section 28-AA which provides for payment of interest on delayed payment of duty by a person who is liable to pay the duty. Thus at the relevant time there was no statutory right entitling the respondents to payment of interest on delayed refund and the writ petition filed by them was not for the enforcement of a legal right available to them under any statute. The claim for interest was in the nature of compensation for wrongful retention by the appellants of money that was collected from the respondents by way of customs duty, redemption fine and penalty. In view of the law laid down by this Court in Suganmal a writ petition seeking the relief of payment of interest on delayed refund of the amount so collected could not, in our opinion, be maintained. The decisions on which reliance has been placed by Shri Rawal were cases where the legality of the orders requiring payment of tax or duty were challenged and the High Court,in exercise of its jurisdiction under Art. 226 of

> the Constitution, while setting aside the said orders, has directed the refund of the amount so collected with interest. The direction for payment of interest in these cases was by way of consequential relief along with the main relief of setting aside the order imposing the tax or duty. Those cases stand on a different footing and have no application to the present case. The appeal is, therefore, allowed. The impugned judgment of the High Court is set aside and the writ petition filed by the respondents before the High Court is dismissed. No order as to costs."

Thus, the decision in the case of Union of India (Supra) also makes it clear that High Court in exercise of its jurisdictioin under Article 226 of the Constitution can direct the refund of amount illegally collected or interest thereon only as a consequential relief and not as the main and the only relief.

9. In the present case, the appellant has not challenged the orders levying octroi and the claim for refund is based on the decision rendered in another case holding the levy to be not exigible in law or illegal. It is an admitted position that the octroi was recovered from the appellant from 1980 to 1983 pursuant to different orders passed by the competent authority. If those orders had been challenged in the writ petition and if the Court were to quash and set aside those orders, refund of excess amount of octroi recovered might have been ordered as a consequential relief, but the petitioner having not challenged legality of those orders in the petition, is not entitled to writ of mandamus directing the Corporation to refund the octroi alleged to have been illegally collected. Under the circumstances, we are of the opinion that the learned Single Judge was justified in rejecting the petition.

10. In view of the judgment of the Supreme Court in Suganmal's case (supra), the remedy of the appellant is to file a suit against the respondent for refund of illegally collected octroi. As observed by the Supreme Court in para-9 of the reported decision, it would be open to the respondent to raise all possible defences to the claim which may be advanced by the appellant. When we have come to the conclusion that a writ petition solely praying for refund of money against the Corporation is not entertainable and the appellant has right of going to the Civil Court for claiming the said amount, it is not necessary for us to examine various

contentions and pleas raised by Mr. B.P.Tanna, learned Counsel for the Corporation because the Corporation will be entitled to raise all possible defences to the claim which may be raised by the appellant in a properly constituted suit.

11. The learned Counsel for the appellant has failed to point out any error committed by the learned Single Judge in the impugned judgment so as to warrant our interference in the present appeal. The appeal, therefore, cannot be accepted and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed, but with no order as to costs.

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(J.M.Panchal,J.) (A.M.Kapadia,J.)

(patel)